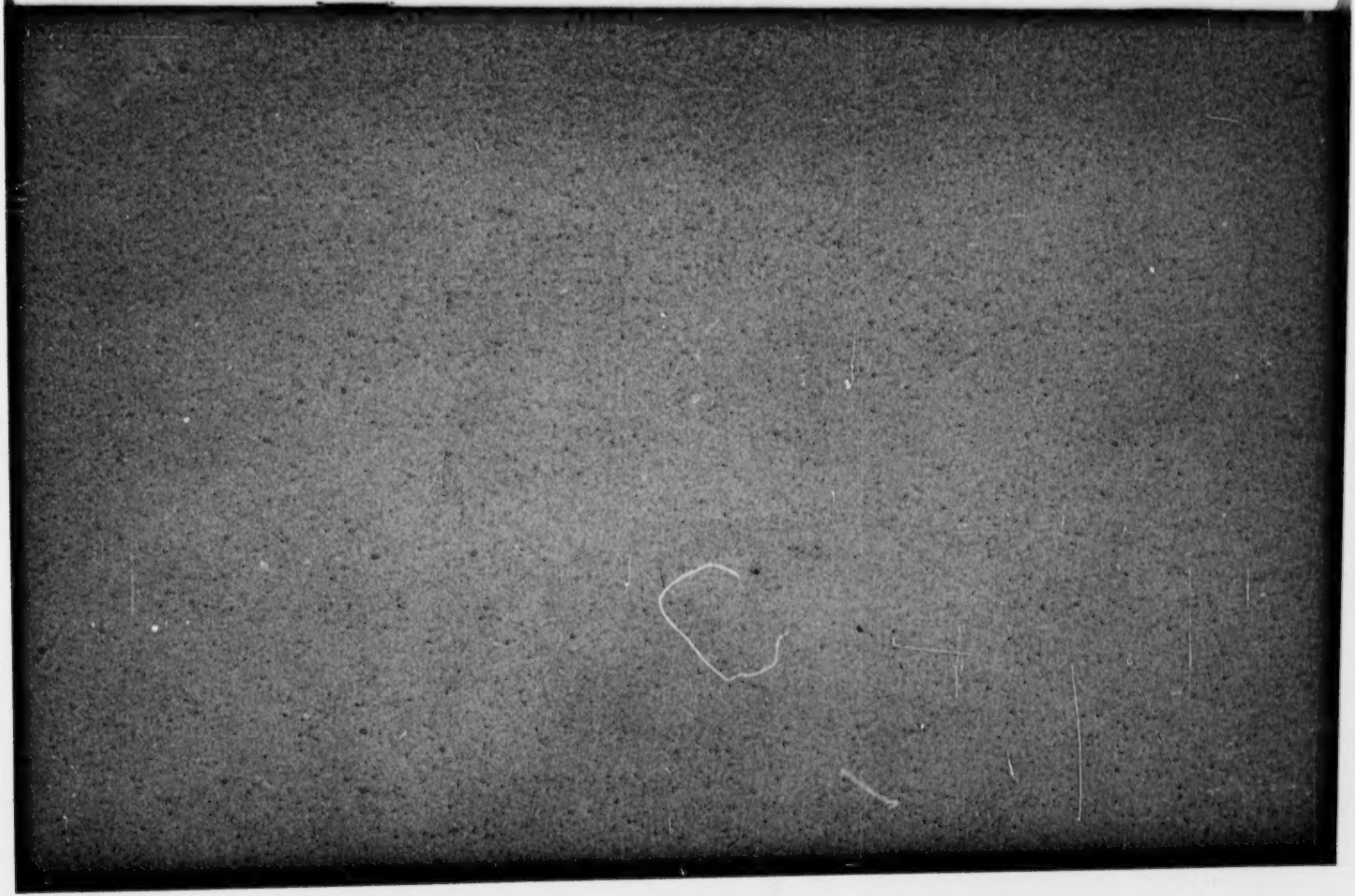

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 73-1974

GARCY CORPORATION,
Plaintiff-Respondent,

vs.

THE HOME INSURANCE COMPANY, CENTENNIAL INSURANCE COMPANY, RELIANCE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, ROYAL INSURANCE COMPANY, LIMITED AND MARYLAND CASUALTY COMPANY,
Defendants-Petitioners.

PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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STATEMENT OF THE CASE.

Because the defendants' statement of facts includes many assertions which are either immaterial to the issues specified in the petition or unjustified by the record, it is necessary for plaintiff to supplement the statement of facts. For simplicity, plaintiff adopts (for purpose of its opposition to the granting of

the petition herein) the following statement of facts contained in the opinion of the Court of Appeals, which adequately states the facts material to defendants' issues:

> "Plaintiff owned five buildings in the same block: a seven-story building, a four-story building, a two-story building, a one-story and a quonset hut. (Kurtzon Aff. (19), pars. 2, 8.)* In April, 1970, each of the six defendant insurance companies issued identical policies totaling $300,000 against fire damage to any or all of the five buildings. (Policy, Ex. A to Compl. (2).)
>
> In May or June of 1970, plaintiff entered into a contract with a wrecking company for the demolition of all the buildings. (Kurtzon Aff. (19), par. 10.) All salvage would become property of the demolition company. The wreckers began work during the last week of June; it was estimated the demolition would take 90 days. (Kurtzon Aff. (19), par. 11.) On July 6, 1970, the company had demolished the quonset hut, the one-story building, part of the two-story building and a small part of the four-story building. (Riccio Aff. (19), par. 3; Kurtzon Aff. (19), par. 13.)
>
> No wrecking or stripping of salvageable material had begun on the seven-story building. (Riccio Aff. (19), pars. 3, 4; Kurtzon Aff. (19), par. 14.) It contained $26,000 of inventory and various machinery and equipment. (Kurtzon Aff. (19), par. 14.) An affidavit of the assistant to the president of plaintiff corporation stated that plaintiff was trying to sell the seven-story building, even while the smaller buildings were being wrecked. (Kurtzon Aff. (19), par. 16.) The building was listed with real estate brokers. (Kurtzon Aff. (19), par. 16.) If plaintiff had found a buyer, it would have halted the demolition. (Kurtzon Aff. (19), par. 16.)
>
> On the evening of July 6, 1970, all the remaining buildings were destroyed by fire. (Kurtzon Aff. (19), par. 17.) An appraisal submitted by plaintiff placed the actual cash

* Record references have been inserted by plaintiff for the convenience of the Court. Numbers in parentheses refer to document number in Record on Appeal.

value of the seven-story building before the fire at $633,532. (Appraisal, Ex. B to Kurtzon Aff. (19); Kurtzon Aff. (19), par. 18.) Defendants refused to pay plaintiff's claim for the total amount of coverage, $300,000. (Compl. (2), pars. 13, 14; Ans. (9), pars. 13, 14.)

The case was submitted to the district court on motions for summary judgment from both sides. Although the complaint alleges a claim based on loss of all the buildings, plaintiff's motion for summary judgment relies on loss of the seven-story building alone. Defendants' motion seeks judgment on the damages issue on the theory that the seven-story building had no value to plaintiff at the time of the fire because of the contract for demolition."

The District Court denied defendants' motion as to its separate defenses (which defenses, involving cancellation and increase in hazard, are not at issue here) but granted defendants' motion as to the damages issue; it denied plaintiff's motion. The Court of Appeals reversed the lower court, remanding the case for entry of summary judgment for plaintiff in the amount of $300,000.00.

Defendants thereafter filed a Petition for Rehearing *In Banc*, which was denied, and have now filed the present Petition for Writ of Certiorari.

INTRODUCTION AND SUMMARY

Defendants seek to bring to this Court an Illinois insurance law issue concerning the effect, under Illinois law, of the execution of a demolition contract on the insurable interest of an insured in an Illinois building.

In its opinion filed herein, the Court of Appeals for the Seventh Circuit determined that, under Illinois law, the insured retained its right to recover under the policy until "the insured had abandoned the building pursuant to an irrevocable commitment to demolish it." Under this rule, plaintiff was clearly entitled to judgment on the record and this was the decision of the Court of Appeals.

Defendants' quarrel with this decision is based on their belief that the Court of Appeals erred in its determination of Illinois law; defendants believe that Illinois law provides that the mere execution of a demolition contract between the owner and a demolition contractor terminates insurable interest.

There is no claim of any kind by defendants of any conflict between the courts of appeal for the various circuits nor is there any claim that there is any constitutional issue in this case if it is conceded that the Court of Appeals was correct in its determination of Illinois law. There is nothing in the petition which suggests that this particular Illinois insurance issue has the importance contemplated by Rule 19 of the Rules of the Supreme Court.

The three specific issues submitted by defendants on pages 3 and 4 of defendants' petition are as follows:

> A. "Whether this Court's 1940 decision in *West* v. *American Telephone & Telegraph Co.* . . . remains a viable and enforceable guideline in diversity cases. . . .
>
> B. Whether the Court of Appeals' [alleged] refusal to apply Illinois law constituted a violation of the Tenth

Amendment to the United States Constitution and further . . . was an unjust discrimination . . . in contravention of the constitutional safeguards of the Fifth Amendment. . . .

C. Whether . . . the Court of Appeals should have . . . [applied] the doctrine of abstention."

None of these specified issues can be a proper basis for granting a Writ of Certiorari in the present case.

There is nothing in this case which in any way questions the viability of this Court's decision in *West*. There can be no constitutional issue in the defendants' disappointment in the Court of Appeals' decision as to the content of the question of Illinois law presented to that Court nor in defendants' being compelled to honor their contract with plaintiff. And the similarity of defendants' position with that of most other disappointed litigants is so great that if abstention is obligatory here, the natural consequence would be either a virtual obliteration of diversity jurisdiction or substantial chaos while new criteria governing abstention are developed.

Defendants' abstention request has been made too late to be considered. The request (which defendants admit is an extension of abstention doctrine) was made for the first time in their Petition for Writ of Certiorari. To merit serious consideration such a request should, in any event, have been made to at least one of the lower courts. Here defendants' desire to invoke abstention (if, indeed, defendants had such a desire prior to losing in the Court of Appeals) was not even mentioned in any motion or brief in either the District Court or the Court of Appeals or even in defendants' Petition for Rehearing in the Court of Appeals.

If a losing party in a diversity case can, after the last petition for rehearing in the Court of Appeals is denied, still find a way to cause the whole lawsuit to be tried again in a new court, the cost in delay and injustice to the parties can indeed by unbearable. But the cost to the judicial system of such tactics is also substantial and we are surprised that defendants could make

such a belated request, especially when, at page 20 of their petition, they acknowledge that, even without these tactics, the courts are overworked and that particular courts are constantly in danger of being deflected from their primary institutional functions.

Granting defendants' petition would aggravate the problems they describe. If defendants have their way, either the Supreme Court will undertake the detailed redetermination of Illinois insurance law in this case or the parties, after having fully litigated this case commencing in 1971 through the Court of Appeals, will be sent back to the state courts and directed to start again from scratch, adding more than three more years to the litigation. Requiring parties to litigate completely the same case twice in two different court systems over a period of nearly seven years is surely not a way to dispense justice or to avoid overburdening our courts.

Defendants' own arguments present compelling reasons for the prompt rejection of the petition filed herein.

ARGUMENT

I.

THE DECISION BY THE COURT OF APPEALS HEREIN FULLY COMPLIES WITH WEST v. AMERICAN TELEPHONE & TELEGRAPH CO.

In pressing for review, defendants rely almost entirely on the decision of this Court in *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 85 L. ed. 139, 61 S. Ct. 179 (1940). There this Court held it was incorrect for the Court of Appeals to reject state law as promulgated by a state intermediate appellate court and substitute its own rule because it deemed that rule superior.

It cannot be reasonably argued that the principles of *West* have in any way been affronted by the proceedings in the present case.

A. THE ACTION BY THE COURT OF APPEALS IN THE PRESENT CASE WAS DRAMATICALLY DIFFERENT FROM THE ACTION PROSCRIBED IN WEST.

West involved a clear rejection of state law by the Court of Appeals (the "Ohio Federal Court") in that case. The Ohio Federal Court had before it the same parties and same cause of action as had been previously before an Ohio intermediate appellate court (the "State Court"). In such prior proceeding, the State Court had held a prior demand in a conversion action to be a necessary element of the cause of action. The Ohio Federal Court held this was incorrect and asserted its right to adopt its own rule because the question had not been decided by the Ohio Supreme Court. Because the facts and the parties were the same, there was no basis for distinguishing the prior state proceeding and there were no other Ohio state court decisions material to the issue.

This Court said such action by the Ohio Federal Court in *West* was incorrect because it was the duty of the federal courts "to ascertain from all the available data what the state law is and apply it. . . ." (311 U.S. at p. 237), and that an intermediate state appellate court decision "is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (311 U.S. at p. 237).

Virtually the entire argument of defendants is based on their claim that the rejection in this case by the Court of Appeals of defendants' *interpretation* of the effect on Illinois insurance law of *Lieberman* v. *Hartford Fire Insurance Co.*, 6 Ill. App. 3d 948, 287 N.E. 2d 38 (1st Dist. 1972) was similar to the action of the Ohio Federal Court in *West*.

This claim to similarity is wholly unjustified for the following reasons:

(i) The Ohio Federal Court opinion involved in *West* acknowledged it was rejecting the State Court decision as bad law. The opinion of the Court of Appeals in the present case cited, considered and distinguished *Lieberman* and made clear that it was determining Illinois law, not substituting its own rule;

(ii) In *West*, the State Court decision involved the same parties and the same cause of action and was indistinguishable from the later federal case; the present case involves different facts and is readily distinguishable from *Lieberman;* and

(iii) More importantly, Ohio law, as involved in *West*, included no data but the Ohio State Court decision rejected by the Ohio Federal Court; however, in the present case there is considerable data as to Illinois law since there has been much litigation in Illinois affecting and controlling the issue in this case.

The ascertainment of Illinois law in compliance with *West* requires the analysis, consideration and reconciliation of many

cases in addition to *Lieberman*, which is by no means the most relevant state court opinion. These cases include:

First National Bank of Highland Park v. *Boston Insurance Co.*, 17 Ill. 2d 147, 160 N.E. 2d 802 (1959).

(a decision by the Illinois Supreme Court which rejected the pecuniary loss limitation urged here by defendants and determined that contracts between the insured and third parties had no effect on insurance recoveries where the fire preceded performance);

DiLeo v. *U. S. Fidelity & Guaranty Co.*, 109 Ill. App. 2d 28, 248 N.E. 2d 669 (1st Dist. 1969).

(which held that a demolition contract, termination of lease and condemnation proceedings all prior to fire did not affect insurable interest);

Knuppel v. *American Ins. Co.*, 269 F. 2d 163 (7th Cir. 1959).

(which held that evidence of intention to demolish was immaterial and inadmissible);

Edlin v. *Security Ins. Co.*, 269 F. 2d 159 (7th Cir. 1959), cert. denied, 361 U. S. 931, 932 (1960), and *American Nat. Bank & Trust Co.* v. *Reserve Ins. Co.*, 38 Ill. App. 2d 315, 187 N.E. 2d 343 (1st Dist. 1962).

(two cases which held that prior condemnation proceedings were irrelevant even though the condemnation award received by the insured was in no way affected by the fire and the insured received both the award and the insurance proceeds).

The teaching of *West* is that state law is to be ascertained from "all the available data". It is elementtal legal principle that *Lieberman* or any other intermediate appellate court decision must be read in a way consistent with the decisions of the Supreme Court of the state and with other relevant decisions. This Court, in *West*, recognized that the federal courts should even disregard any intermediate appellate court decision if the federal court "is convinced by other persuasive data that the

highest court of the state would decide otherwise". (311 U.S. at p. 237).

We respectfully submit that the opinion of the Court of Appeals herein has correctly analyzed *Lieberman*, and reconciled it with the other relevant Illinois decisions. In contrast, defendants' reading of the case would put it in conflict with decisions of the Illinois Supreme Court and other decisions of the Illinois Appellate Courts.

B. THE OPINION OF THE COURT OF APPEALS HEREIN MAKES CLEAR THAT THAT COURT ASCERTAINED AND APPLIED ILLINOIS LAW IN FULL COMPLIANCE WITH WEST. DEFENDANTS' ONLY OBJECTION IS ONE WHICH CANNOT BE A PROPER BASIS FOR CERTIORARI.

The best evidence of what the Court of Appeals has done in the present case is the opinion of that Court. We respectfully submit that any reading of that opinion makes clear that the Court of Appeals for the Seventh Circuit, in fact, duly considered and analytically determined, Illinois law on the basis of all available data, and that it then applied that law to the facts in the record.

The opinion of the Court of Appeals in this case thus demonstrates full compliance with the teaching of *West*.

There is nothing in defendants' petition which challenges this. The thrust of defendants' argument is that the distinction between *Lieberman* and the present case relied upon by the Court of Appeals was, to use their own term, "illusory". This is, indeed, a familiar complaint. Virtually every unsuccessful litigant views the distinctions relied on by the court which rules against him as being illusory.

There is no way for this Court to hear all diversity cases in which a disappointed litigant believes his authorities have been incorrectly distinguished and the Court of Appeals has incorrectly determined state law. And there is nothing in the petition

which suggests such special importance of the issue as is required by Rule 19(1b) of the Supreme Court Rules; nor is there any suggestion of anything special in Illinois insurance law which singles it out for special treatment.

Even if there were substantial justification for defendants' disappointment (and as is indicated below, no such justification exists), there is no basis for certiorari. *West* was clearly not intended to constitute this Court as the final determiner of the content of pure state law questions in diversity cases whenever a disappointed litigant believes the Court of Appeals was in error.

C. THE DIFFERENCES BETWEEN THE PRESENT CASE AND LIEBERMAN ARE SO GREAT THAT THERE CAN BE NO BASIS FOR APPLYING WEST TO JUSTIFY GRANTING OF CERTIORARI IN THE PRESENT CASE.

In *West* the rejection of state law was established in the opinion of the Ohio Federal Court which itself made clear that the case in the Ohio Federal Court was in no way distinguishable from the prior case before the State Court.

This is not true here. The facts in *Lieberman*, which defendants assert played a similar role to the State Court proceeding in *West*, are plainly different from those in the present case. Among the differences between the two cases are the following:

(i) In *Lieberman*, at the time of the fire, the insured's commitment to complete the demolition was specifically enforceable because of special circumstances there present. In the present case there was no basis for specific performance so that the insured (unlike the insured in *Lieberman*) had, at the time of fire, the full power to prevent the commencement of demolition. The possibility that the insured could have been required to pay damages to the demolition contractor based on its lost profit does not affect the insured's control over the fate of the building.

(ii) In *Lieberman*, at the time of fire, physical demolition of the building there at issue had already commenced. In the present case, at the time of fire, the demolition contractor had done neither any demolition work nor any salvage work on the building here at issue.

These are not insignificant factual differences. The issue before the Court of Appeals in the present case was whether, at the time of the fire, the plaintiff's seven-story building should be treated as a building for the purpose of the insurance policy sold by defendants to plaintiff. On this issue, whether demolition has commenced and whether the insured has a specifically enforecable obligation to proceed with actual demolition cannot be dismissed as insignificant.

In fact, the power of the insured to prevent demolition at the cost only of a damage claim has been recognized as a significant factor in many jurisdictions. E.g., *Paterson-Leitch Co.* v. *Insurance Co. of North America*, 366 F. Supp. 749 (N.D. Ohio 1973); *Royal Ins. Co.* v. *Sisters of Presentation*, 430 F. 2d 759 (9th Cir. 1970); 4 Appleman, Insurance Law and Practice, Sec. 2245, note 48, p. 169. Distinctions thus regarded as significant cannot be deemed illusory.

In determining the time when a building should be no longer treated as a building for insurance purposes, a line must be drawn. Focusing on when significant physical demolition has begun and whether the obligation of the insured is specifically enforceable is clearly a reasonable way to draw that line. It is, therefore, not surprising that the insurance company should have prevailed on the facts in *Lieberman* and that the insured should prevail in the present case; these thoroughly predictable results provide no reason for the granting of certiorari in the present case.

D. THE DECISION BY THE COURT OF APPEALS IS REQUIRED BY THE SPECIFIC PROVISIONS OF THE INSURANCE POLICY SOLD BY DEFENDANTS TO PLAINTIFF.

This is an action to enforce a contract.

Defendants acknowledge that Illinois law respects the "integrity of contracts", that it treats contracts as "inviolable" and, more importantly, that "stipulations of the parties are given effect as written. . . ." (Defts' Pet. pp. 12, 18.) Illinois law will not permit defendants to reject their contractual obligations to plaintiff.

1. It Is Determinative of This Case That in Illinois, as Defendants Explicitly Recognize, Contracts Are Enforced as Written.

Under Illinois law an insurance policy is a contract. The insurance company undertakes to pay insurable value in the event of fire. The calculation of insurable value is wholly governed by the terms of the policy. In the present case, there is no doubt that insurable value is equal to cost of reproduction minus depreciation for age and that this value exceeded the policy amount.

The reason defendants must pay the policy amount to plaintiff is simply that this is what defendants *agreed* to do in consideration for the premium paid. As discussed below, there is nothing in the policy which excuses defendants because the demolition contract was signed or because plaintiff may have suffered a pecuniary loss smaller than the policy amount.

Defendants clearly resist paying insurable value in this case because they believe it exceeds the pecuniary loss suffered by plaintiff. But even if this is so, the present case is but one of many examples of this result. The cases cited herein make clear that in such cases, insurable value always controls; the contract is enforced as written. The Illinois courts have wisely insisted that if pecuniary or financial loss is to be injected into

insurance recoveries, it must be done by including provision for this in the policy itself.

Indeed, this principle is often rather dramatically illustrated. In *DiLeo* v. *U. S. Fidelity & Guaranty Co.*, 109 Ill. App. 2d 28, 248 N. E. 2d 669 (1st Dist. 1969), for example, the Illinois Appellate Court, in considering a business interruption policy, followed the policy language precisely in awarding lost profits for the full period required for physical restoration even though the insured's right to occupancy was due to end three days after the fire, and even though a prior condemnation and *demolition contract* would have effectively prevented such restoration.

There is nothing in the holding of *Lieberman* inconsistent with this honoring of the integrity of defendants' contract with plaintiff. The insurance policy insured a "building" and falls by its own terms when the building ceases to exist as such. *Woodruff* v. *Southeastern Fire Ins. Co.*, 426 F. 2d 555 (5th Cir. 1970). But, at the earliest, the status of the building as such can be treated as changed only when the building has been abandoned pursuant to an irrevocable commitment to demolish, the test applied by the Court of Appeals herein. The same test would, when applied to the facts in *Lieberman*, deny recovery to the insured in that case.

2. Plaintiff Was Entitled to Recover Under the Terms of Its Agreement with Defendants.

The following is the critical policy language:

> "[the defendant] does insure the insured . . . to the extent of the actual cash value of the property at the time of loss . . . nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE . . . to the property. . . ." (Insurance Pol., Ex. A to Compl. (2)).

Under this language it is clear that the decision of the Court of Appeals herein was the *only* decision that could

reasonably be expected from a court charged with ascertaining and applying Illinois law for the following reasons:

(i) The measure of damages specified in the policy is "actual cash value". Under Illinois law this clearly means cost of reconstruction minus depreciation for age. *Smith* v. *Allemannia Fire Ins. Co. of Pittsburg*, 219 Ill. App. 506 (1920). This measure of recovery is in no way affected by market value of the building, by the "pecuniary loss" suffered,* by any other valuation concept nor by any estimate or prediction of what would have happened to the building if the fire had not occurred. *First National Bank of Highland Park* v. *Boston Insurance Co.*, 17 Ill. 2d 147, 160 N. E. 2d 802 (1959).

(ii) Under this policy language, the value of the building for loss purposes must be determined "at the time of loss." This focuses attention solely on the condition of the building at the time of the fire. This language makes immaterial any future events which might either be predictable or even certain but which would have occurred after the fire. 4 Appleman, Insurance Law and Practice, Sec. 2245, pp. 167-69; *Bailey* v. *Gulf Ins. Co.*, 406 F. 2d 47 (10th Cir.

* The basic thrust of the law of a jurisdiction is often best indicated by the tenor of criticisms directed against it. So strict is the adherence of the Illinois Courts to awarding insurable value based on reconstruction cost that it has been called "rigid" (*Chicago Title & Trust Co.* v. *U.S. Fidelity & Guaranty Co.*, 72 C 3225 (N.D. Ill. 1973) (see page A24 of defendants' Appendix to Petition) and insurance company counsel has referred to the Illinois rule as one which ". . . will *not* consider *all* the circumstances in valuing a property loss." (emphasis in original) (Stephen Marcus, "Actual Cash Value, Illinois and the Broad Evidence Rule: 'A Modest Proposal' ", 59 Ill. Bar J. 1000, 1009 (1971). Whether these criticisms are just or not, they establish that Illinois law is not receptive to the pecuniary loss concepts urged by defendants. While the issue in this case is to ascertain the rule of law followed by Illinois, rather than to determine what that law ought to be, plaintiff respectfully submits that the Illinois rule is understandable and predictable by purchasers of insurance policies and is a correct and salutory rule.

1969); *DiLeo* v. *U. S. Fidelity & Guaranty Co.*, 109 Ill. App. 2d 28, 248 N. E. 2d 669 (1st Dist. 1969).

(iii) The only limitation dealing with the interest of the insured is the provision limiting recovery to "the interest of the insured," but this limitation has been definitively construed by the Illinois Supreme Court as being fully met if the insured owned the fee simple title at the time of fire. *First National Bank of Highland Park* v. *Boston Insurance Co., supra.*

(iv) The policy insured against "loss . . . to the property" and not loss to the pocketbook of the insured. This requires the insured only to prove injury to the building and does not require him to prove any financial injury to the insured himself. *Federowicz* v. *Potomac Insurance Co. of Dist. of Col.*, 183 N.Y.S. 2d 115, 7 A.D. 2d 330 (1959). (New York Court construing policy language identical to policy in this case).

3. The Only Situation Where Illinois Insurance Law Permits an Insurance Company to Avoid Making the Payment Required Under Its Policy Is Where the Insured Does Not Own the Property and This Exception Has No Relevance in the Present Case.

The only situation in Illinois real property insurance law where the Illinois courts have relieved an insurance company from its contractual obligations is in the limited case where insurance is purchased by one who does not own the insured property. Even then, a non-owner who has a "pecuniary interest" is permitted to purchase insurance.

Defendants have attempted to convert this historic exception (permitting a non-owner to purchase insurance if he has a "pecuniary interest" in the insured property) into a defense which can prevail against one who clearly was the owner. But the cases dealing with rights of non-owners to buy insurance are irrelevant here; where the insured is the fee owner

who properly purchased the insurance, his rights are governed by the policy language.

The *reductio ad absurdum* of this misuse of the cases dealing with purchase of insurance by non-owners is defendants' own mis-citation of the Appleman treatise on insurance. On page 19 of their petition defendants quoted a statement in Appleman out of context. While the statement quoted deals only with the right of non-owners to buy insurance, it is quoted so it could be read to impose a general pecuniary loss limitation on all purchasers of insurance. In fact, Appleman makes clear that the language quoted by defendants has nothing to do with the issue herein since in the section of the treatise dealing with the present issue Appleman states that:

> "The insurable interest of the parties to an insurance contract must be determined by the facts existing at the time of the loss, and such interest is not defeated by unascertained and speculative future events. Thus, the intention of the insured to demolish part or all of the insured property, or even the existence, before loss, of a contract to that effect, has been held not to affect the insurable interest where the property had not been altered or demolished when the loss occurred." (4 Appleman, Insurance Law and Practice, Sec. 2245, pp. 167-69).

II.

THERE IS NO BASIS FOR CONSIDERATION IN THIS CASE OF THE DOCTRINE OF ABSTENTION.

The defendants' alternate request is for "a more liberal application of the doctrine of abstention" (Defts' Pet. p. 21) which would result in relitigating the entire case from the beginning in the state courts.

The sole justification urged by defendants for making abstention obligatory in this case is the alleged "difficulty of the question of state law." (Defts' Pet. p. 21.)

This Court has already held that "difficulty of the question of state law" is not a proper basis for abstention. *Meredith* v. *Winter Haven*, 320 U.S. 228, 88 L. ed. 9, 64 S.Ct. 7 (1943), held it to be error for the Court of Appeals to decline to consider a case merely because the state law was uncertain or difficult to determine.

In substance, by its petition, defendants are asking this Court to reconsider its decision in *Meredith*—and even further—they ask this Court to hold abstention is obligatory under circumstances where in *Meredith* it was not even permissible.

There is no basis for the sharp break with judicial tradition proposed by defendants.

Abstention can serve a useful purpose in a limited number of cases but only where the state courts *have not spoken.* Federal courts normally decline to consider an issue only where an unnecessary or ill-defined constitutional issue can thereby be avoided; it is clear this justification has no applicability in this case.

Defendants make no attempt to characterize the issue herein as one on which the Illinois Courts have been silent. In view of their attempts to characterize Illinois law as being "perfectly clear on the question presented" (Defts' Pet. p. 21), they could not, and did not, go beyond an assertion that the issue was difficult. Moreover, the truth is that there has been considerable litigation in Illinois material to the issue presented to the Court of Appeals in this case (e.g. *First National Bank, DiLeo, Lieberman, Knuppel, Edlin, American National Bank*) and the judicial task of the Court of Appeals was to compare, interpret and reconcile those cases and others. This is the typical task faced by the federal courts in virtually every diversity case.

Because it is such a representative diversity case, permitting abstention here will necessarily either obliterate diversity jurisdiction or initiate chaos while new criteria for selective application of abstention are being developed. Abstention must remain, as it always has been, a limited doctrine confined to highly

special circumstances. There is nothing in this petition which suggests that defendants' request for abstention is anything more than the complaint of a disappointed litigant who would like the chance to relitigate the case again from the beginning in a different court.

In *Meredith* this Court stated, at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has been from the first deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

The Court went on to say at pages 234-35:

> "When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

Nor was there anything in the character of the issue in *Meredith* which distinguishes it from this case. *Meredith* involved the issue of whether a Florida city had the power to call and retire its bonds. This Court there held that the determination of *that* issue was a decision that the Court of Appeals was required to make, and in this connection, this Court stated, at pages 236-37:

> "The decision of this case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agen-

> cies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."

What was said in *Meredith* applies *a fortiori* in the present case. This case solely involves the liability at law of the defendant insurance companies under insurance policies sold by them. There are no circumstances in the present case that would involve interference with administrative agencies or the state courts. The federal court is sitting in the very state in which the dispute arises. As in *Meredith*, requiring the parties here to litigate in the State courts would compound the more than three years already devoted to this litigation by adding at least three or more years for complete litigation in the State courts.

There is nothing in any of the subsequent decisions by this Court that in any way suggests that the basic principles of *Meredith* do not still control. (See, generally, Annotation on Abstention Doctrine, 20 L.ed. 2d 1623.) Indeed, this Court has indicated that the doctrine is applicable only in narrowly limited "special circumstances" (*Zwickler* v. *Koota*, 389 U.S. 241, 19 L.ed. 2d 444, 88 S.Ct. 391 (1967)), and that it favors only a restricted use of the doctrine. This case does not compare with *Lehman Brothers* v. *Schein*, 42 Law Week 4603 (1974) which involved a New York federal court determining Florida law; the present case involves an Illinois federal court

determining Illinois law by a judge who was formerly an Illinois bar examiner and who practiced for many years in Illinois prior to appointment to the Federal bench. And even in *Lehman Brothers* where the issue was one on which the state courts had not spoken, where the Court of Appeals had determined there were no relevant State court decisions and where there was an expeditious procedure for certifying the issue directly to the Supreme Court of Florida, this Court did not order abstention but rather referred the issue of abstention to the discretion of the Court of Appeals. Defendants would have abstention available to all petitioners who disagree with the way their authorities are analyzed or distinguished. This is hardly consonant with this Court's pronouncement.

CONCLUSION.

Defendants ask this Court to take one of two courses:

(i) To undertake the redetermination of the Illinois law question which has been determined by the Court of Appeals; or

(ii) to order that the Federal Courts abstain from hearing the case so that the parties must begin again from scratch in the State Court.

The petition does not justify consideration by the Supreme Court of either of these courses requested by defendants.

There is nothing in the petition which establishes that, as required by Rule 19 of the Rules of the Supreme Court, the "Court of Appeals . . . has decided an important state . . . question in conflict with applicable state . . . law. . . ." Defendants present nothing but the complaint of a disappointed litigant. Moreover, when all the data bearing on the language of the policy and the determination of Illinois law is considered, defendants have no just complaint; they are being held merely to perform their contract in accordance with established Illinois law. As they themselves have acknowledged, under Illinois law, contracts "will not be rewritten by the Court" (Defts' Pet. p. 12).

There is even less justification for the untimely request for abstention. Defendants' brief itself demonstrates that similar insurance claims have been heard by the Federal Courts for years. This is a typical case for diversity jurisdiction and, even taking defendants' characterization of the issue at face value, it is clearly not a basis for abstention under the decision of this Court in *Meredith*. There is nothing in the petition which suggests any reason for reconsideration of *Meredith*. As defendants' brief also demonstrates, insurance companies are satisfied

to litigate in any court when they win (as indicated by defendants' enthusiastic citation of *Aetna* and other federal decisions they deem favorable to insurance companies) and nourish the hope for brighter days in another forum when they lose. This reaction, although understandable, and perhaps shared by all litigants, cannot be a justification for certiorari.

Defendants' petition is, in fact, frivolous. It should be promptly rejected.

Respectfully submitted,

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